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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1970

No. 359

THOMAS CANTONE,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Thomas Cantone, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him in the above entitled case on May 8, 1970, upon which the Petitioner was sentenced to one year and one day imprisonment on each of two counts, said sentences to run concurrently.

A.

The Opinion Below

On May 8, 1970, the Petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C.

Question Presented

Whether certain testimony which had no probative value with respect to any of the factual issues at the trial but which characterized the Petitioner as a manipulator prejudiced the Petitioner, thereby denying him a fair trial.

D.

Constitutional Provisions and Statutes

The Statutes involved are: Title 18, United States Code, Section 371; Title 26, United States Code, Section 7206(2); Title 26, United States Code, Section 6041.

E.

Statement of the Case

The appellant was named in a five (5) count indictment[1] charging him with conspiracy to defraud the United States in the ascertainment and collection of information used by the Internal Revenue Service in the determination of his tax liability.

He was also charged with forwarding false and material information to the Internal Revenue Service in violation of Section 7206(2) of Title 26, United States Code.

Yonkers Raceway operated a system of parimutual betting known as the "twin double". To win the twin double, it was necessary to purchase a Two ($2.00) Dollar ticket naming the winning horse in both the 6th and 7th races. If both of these horses won, it was still necessary to exchange that ticket for a second ticket naming the winning horse in both the 8th and 9th races. When cashing any ticket worth more than $600.00, the Raceway was required by Section 6041 of Title 26, United States Code, to have the recipient of the money fill out a verification form on which he would state his name, address, and social security number. From these verification forms, Yonkers Raceway prepared Internal Revenue Service Information Form 1099. The completed form was sent to the Internal Revenue Service and was used to verify whether a tax payer had reported all of his income for a particular year.

The gist of the Government's case with respect to the conspiracy count was that the Petitioner, having procured

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[1] Trial proceeded as to but Count One, charging a conspiracy and Count Three as to a specific substantive violation. The remaining counts were severed and after sentencing, dismissed.

winning twin double tickets worth more than $600, conspired to have these tickets cashed by persons who would receive a commission for this act thereby withholding from the Government the name of the true winner of the tickets.

At the trial below, three Government witnesses testified that they had cashed various twin double tickets for the Petitioner, the last such act occurring in April of 1965.

In addition, Michael Herbst, testifying for the Government, stated that on January 31, 1966 in a parking lot of a Nassau County bank, the Petitioner had asked him to cash two certified checks issued by Roosevelt Raceway, the payees of these checks being unknown to Herbst. When Herbst agreed to do so, two men came up to the Petitioner and the Petitioner gave each of them some money. Herbst had the two checks cashed and gave the proceeds to the Petitioner. Herbst received $200 for his participation in these transactions.

Jack Stallone testified on behalf of the Petitioner with regard to the Herbst incident and stated, in substance, that he was the payee of one of the checks identified by Herbst and that he had received that check in payment for a winning twin double ticket which he had purchased and had asked the Petitioner to cash the check for him. He paid the Petitioner $100 for this service and further testified that a friend of his also paid the Petitioner to cash a similar check at the same time.

During its deliberations, the jury requested a reading of Stallone's testimony, which request was granted.

ARGUMENT

Certain testimony which had no probative value with respect to any of the factual issues at the trial but which characterized the petitioner as a manipulator prejudiced the petitioner, thereby denying him a fair trial.

As a result of the introduction of the Herbst testimony, the Government was allowed to create in the minds of the jury by insidious innuendo the impression that the Petitioner was a "wheeler-dealer" type of manipulator. The probability that the Herbst testimony and the prejudicial inferences that could have been drawn therefrom influenced and concerned the jury is strongly supported by the fact that the jury requested and received a reading of Stallone's testimony during its deliberations. This testimony dealt exclusively with the Herbst transaction.

A defendant in a criminal case is not immune from prejudicial testimony or even innuendo where such testimony and innuendo derive from probative evidence. Even where the evidence has some probity but is highly charged and likely to distract the jury's attention from the issues of fact in a given case, the Trial Court must weigh the probity against the prejudice. With respect to the Herbst testimony, however, there was no probity and there was substantial prejudice.

The Petitioner was charged in substance with concealing the true recipient of gambling proceeds by conspiring to have people other than the true winners cash tickets and provide the various information required by Form 1099.

The first such transaction about which there was any direct testimony at the trial below occurred in April of 1965.

To put it simply, the Herbst transaction had nothing whatever to do with the Government's theory of the Petitioner's

participation in the alleged conspiracy with respect to time, place, substance, and dramatis personae. The only purpose for the introduction of this testimony was to smear the Petitioner with the stigma of operator, manipulator, "wheeler-dealer". In that purpose and towards that end the Government was horribly successful. The only way in which the Herbst incident could in any way relate to the conspiracy charged is if the checks cashed by Herbst were in fact the proceeds from a winning twin double ticket cashed by someone other than the person who originally bought the tickets. As to this critical requisite there was absolutely no proof offered at the trial below and, in fact, this possibility was flatly contradicted by Stallone. Furthermore, the Herbst transaction occurred a full nine months after the last previous act alleged to have been committed in furtherance of the conspiracy. The Herbst transaction occurred during the day in the parking lot of a bank while the activity relating to the conspiracy occurred at night at racetracks. None of the people involved in the Herbst transaction with the exception, of course, of the Petitioner had anything to do with the activities relating to the conspiracy.

The only connection between the Herbst incident and the conspiracy charged is that both involved winning twin double tickets. On the basis of that nexus the Government was allowed to raise before the jurors the specter of a slippery operator, and as a result the Petitioner was denied his right to a fair trial before a dispassionate and objective jury.

Fundamental to our system of justice is the right of the defendant to be tried only for crimes for which he has been charged and that the evidence presented against him shall be limited to issues of fact relating to that charge. The defendant cannot be tried for being a bad man. *Michelson* v. *United States*,

335 U.S. 469 (1948). Nevertheless, this is precisely what occurred at the trial below.

The risk of injustice being done to a defendant charged with the crime of conspiracy is already very great by reason of the elements of that crime and certain rules of procedure in evidence relating thereto. Justice demands that our Courts be zealous in its scrutiny of prosecutions commenced of such a crime. If the decision by the Court of Appeals affirming the Petitioner's conviction is allowed to stand, defendants charged with conspiracy will be forced to meet the insurmountable burden of defending against the subtle but treacherous innuendoes raised against him by the Government resulting from conduct wholly unrelated to the crimes for which he may be charged.

CONCLUSION

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 501, 502—September Term, 1969.

(Argued January 23, 1970 Decided May 8, 1970.)

Docket Nos. 32684-5

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS CANTONE and IRWIN ROSEN,

Appellants.

Before:

MOORE, FRIENDLY and HAYS,

Circuit Judges.

Appeals from convictions after a jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, on a charge of aiding in the preparation of a false internal revenue form and conspiracy to defraud the United States with respect to information as to tax liability, in violation of 26 U.S.C. §7206(2) (1964) and 18 U.S.C. §371 (1964).

Affirmed as to Cantone; reversed as to Rosen.

THEODORE KRIEGER, New York, N. Y. (Albert J. Krieger, New York, N. Y. on the brief), *for Appellant Cantone.*

PHYLLIS SKLOOT BAMBERGER, New York, N. Y. (Milton Adler; The Legal Aid Society, New York, N. Y., on the brief), *for Appellant-Rosen.*

JOHN W. NIELDS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, William B. Gray, Assistant United States Attorney, of counsel); *for Appellee.*

HAYS, *Circuit Judge*:

Thomas Cantone and Irwin Rosen appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York on an indictment charging them, together with others not named as defendants, with violating 18 U.S.C. §371 (1964) and 26 U.S.C. §7206(2) (1964)[1] by conspiring to defraud the United States in the ascertainment and collection of information used by the Internal Revenue Service in determining the tax liability of appellants and others;

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[1] 26 U.S.C. §7206(2) provides:

"§7206. Fraud and false statements.

"Any person who—

* * * * *

"(2) Aid or assistance.

"Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the persons authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

and with one substantive count[2] of aiding in the preparation of a false internal revenue form in violation of 26 U.S.C. §7206(2) (1964). Both appellants were sentenced to one year and one day's imprisonment on each count, the sentences to run concurrently.

I.

Evidence was introduced to show that in 1964 a system of pari-mutual betting known as the "twin double" came into use at various race tracks including the Yonkers and Roosevelt Raceways in New York. At these tracks the bettor of a twin double purchases a ticket for horses in the sixth and seventh races. If both horses win, he exchanges this ticket for one with his choice of horses in the eighth and ninth races. If the horses selected on this latter ticket are also winners, the bettor has a winning twin double ticket. Such a ticket usually entitles its holder to a substantial payoff. Until January 1966 cash was paid for winning twin double tickets. Since then Roosevelt Raceway has paid by check for all tickets worth over $5,000.

Of course gambling winnings constitute taxable income. Upon payment of winnings in excess of $600 race tracks are required[3] to prepare a form which includes the name, address and signature of the payee. From this form the race track prepares and files Internal Revenue Service Information Form 1099 the purpose of which is to assure that winnings will be included in the winner's income tax return.

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[2] Three other substantive counts were severed and ultimately dismissed.

[3] See 26 U.S.C. §6041(a), (d) (1964).

The government sought to prove that appellants participated in a conspiracy to procure persons who would, for a commission, cash their winning twin double tickets for them, thus enabling appellants to avoid tax liability for the amounts won.

Appellants were also charged with a substantive count of aiding in the preparation of a false 1099 form with respect to a $4,196.50 ticket cashed on July 28, 1964.

II.

Rosen's Appeal

The appellants were convicted of aiding in the preparation of a fraudulent 1099 form which concealed the real name of the winner on a July 28, 1964, twin double ticket worth $4,196.50. Rosen argues that his conviction on this count must be reversed, since the evidence failed to show that he had any connection with the transaction on which the count was based.

Because of the absence of direct proof of Rosen's participation in the July 28th transaction, the government based its case against Rosen on this count on the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946). In *Pinkerton* no evidence was introduced to show that one of the defendants participated directly in the commission of the substantive offenses of which he was convicted. However, the Court ruled that the defendant could be found guilty of the substantive crimes:

> "if it was found *at the time those offenses were committed petitioners were parties to an unlawful con-*

> *spiracy* and the substantive offenses charged were in fact committed in furtherance of it." *Id.* at 645 (emphasis added).

Pinkerton holds and the trial court charged[4] that for the doctrine to be applicable the jury had to find beyond a reasonable doubt that the substantive crime was committed, that it was in furtherance of the conspiracy, and that at the time the act was committed appellant was a member of the conspiracy.

The only evidence before the jury on the issue of whether Rosen had joined with Cantone in a conspiracy before July 28, 1964, consisted of one Pipitone's testimony that he cashed twin double tickets for appellants during the period between May 14 and July 29, 1964, and

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[4] In his charge on this point Judge Cooper said:

"You will recall that the witness Pipitone testified that he cashed a winning Twin Double ticket given to him by the defendant Cantone on July 28, 1964.

"There was no testimony that the defendant Rosen was present. You may still find the defendant Rosen guilty of the crime charged on the second count relating to the cashing of this ticket if you find the following beyond a reasonable doubt:

"One, that the offense charged in the second count was committed by the defendant Cantone;

"Two, that at the time this offense was committed by the defendant Cantone, the defendant Rosen was a member of the conspiracy charged in count 1;

"And, three, that the offense charged in the second count was committed in furtherance of the conspiracy charged in count 1.

"This result follows from the nature of the conspiracy as I have explained it to you.

"The criminal intent to do the act is established by the formation of the conspiracy. If you find that the existence of the conspiracy and the membership in it of the defendant Rosen, and that the crime was in furtherance of the conspiracy, then the defendant Rosen must bear the responsibility for the commission of the crime, too."

one Aquilato's testimony that he cashed tickets for appellants between April and November of 1964. The first specific instance Pipitone was able to recall was that of July 28th, which did not involve Rosen. Aquilato was unable to recall *any* specific instances. Several witnesses stated that they saw the appellants together at Yonkers and Roosevelt Raceways before July 28, 1964, but that fact, without more, cannot establish that they were conspiring. See e.g., *United States* v. *Di Re*, 332 U.S. 581, 593 (1948); *Causey* v. *United States*, 352 F.2d 203, 207 (5th Cir. 1965).

We hold that the evidence on this issue was insufficient to establish beyond a reasonable doubt that Rosen had joined with Cantone in a conspiracy before July 28, 1964. Though the jury could have found from Pipitone's testimony that there was a conspiracy between appellants on July 31, 1964, this finding cannot cure the insufficiency of the evidence to establish the existence of such a conspiracy three days earlier. The *Pinkerton* rationale is, therefore, inapplicable, and Rosen's conviction on the substantive count must be reversed. Cf. *Thomas* v. *United States*, 398 F.2d 531, 542 (5th Cir. 1968) (order denying petition for rehearing).

The trial judge's erroneous submission to the jury of the issue of Rosen's guilt on the substantive count and the giving of the *Pinkerton* charge undoubtedly influenced the jury's finding of Rosen's guilt on the conspiracy charge. We conclude that the errors with respect to the substantive count so tainted Rosen's conspiracy conviction that we must also reverse that count.

III.

Cantone's Appeal[5]

Cantone contends that the testimony of one Herbst concerning the cashing of twin double checks in January 1966 was inadmissible because the evidence directly relating to the conspiracy fails to show that it continued after the spring of 1965. The government argues that Herbst's testimony itself shows the continuation of the conspiracy.

The fact that the government did not offer proof of the conspiracy's continued existence at regular intervals[6] during the period charged does not require a finding that it had ended, absent some affirmative act of withdrawal by Cantone. See e.g., *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *United States* v. *Borelli*, 336 F.2d 376, 388-90 (2d Cir. 1964), cert. denied sub nom. *Mogavero* v. *United States*, 379 U.S. 960 (1965).

It was not error for the trial judge to declare one of the government's witnesses to be a hostile witness and allow him to be cross-examined on the basis of a prior affidavit.

Cantone's other assignments of error are not persuasive. We affirm his conviction.

Reversed as to Rosen. Affirmed as to Cantone.

FRIENDLY, *Circuit Judge* (concurring):

I concur in the reversal of Rosen's conviction. As to Cantone, I concur in the result.

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[5] Because of the disposition of Rosen's appeal, we need not consider the effect of these additional assignments of error on his case.

[6] The jury could have credited Herbst's testimony that Cantone asked him to cash twin double tickets in mid-1965 as showing the continuation of the scheme.

APPENDIX B

Statutes

Title 18, United States Code, Section 371

§ 371. Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 26, United States Code, Section 7206(2)

§ 7206. Fraud and False Statements

Any person who—

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

Appendix B—Statutes

Title 26, United States Code, Section 6041

§ 6041. INFORMATION AT SOURCE

(a) *Payments of $600 or more.*—All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments to which section 6042(a) (1), 6044(a) (1), or 6049(a) (1) applies, and other than payments with respect to which a statement is required under the authority of section 6042(a) (2), 6044(a) (2), 6045, 6049(a) (2), or 6049(a) (3)), of $600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Secretary or his delegate, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary or his delegate, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

(b) *Collection of foreign items.*—In the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by any person undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange, such person shall make a return according to the forms or regulations

prescribed by the Secretary or his delegate, setting forth the amount paid and the name and address of the recipient of each such payment.

(e) *Repealed. Pub.L. 87–834, § 19(f) (2), Oct. 16, 1962, 76 Stat. 1058.*

(d) *Recipient to furnish name and address.*—When necessary to make effective the provisions of this section, the name and address of the recipient of income shall be furnished upon demand of the person paying the income. Aug. 16, 1954, c. 736, 68A Stat. 745; Oct. 16, 1962, Pub.L. 87–834, § 19(f), 76 Stat. 1058.

Title 28, United States Code, Section 1254(1)

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1970. On June 1, 1970, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including July 7, 1970, and the petition was filed on July 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

400-478—70

QUESTION PRESENTED

Whether the prejudicial effect of certain testimony so outweighed its probative value as to call for its exclusion.

STATEMENT OF THE CASE

After a trial to a jury, petitioner was convicted on two counts of conspiracy to defraud the United States in the ascertainment and collection of information used by the Internal Revenue Service in determining the tax liability of himself and others, in violation of 18 U.S.C. 371 and 26 U.S.C. 7206(2). He was fined and sentenced to one year and one day's imprisonment on each count, the sentences to run concurrently. The judgment was affirmed by the court of appeals on May 8, 1970.

The government established that Yonkers Raceway operated a system of parimutual betting known as the "twin double" which, because of the long odds, yielded winning tickets often worth many thousands of dollars. When cashing any ticket worth more than $600, the Raceway was required by 26 U.S.C. 6041 to have the recipient of the money fill out a verification form on which he would state his name, address, and social security number. From this verification form, Yonkers Raceway would then prepare Internal Revenue Service Information Form 1099. The completed form was sent to the Internal Revenue Service (Tr. 32–57)[1] for

[1] Page references unless otherwise indicated are to the typewritten transcript of the stenographic minutes of the trial.

its use in verifying whether a taxpayer had reported all of his income for a particular year (Tr. 58–68).

Joseph Pipitone testified that during 1964 he went almost every evening to Yonkers Raceway or Roosevelt Raceway—depending on which was open—and that he frequently cashed twin double tickets for other people for a commission (Tr. 72). He stated that he saw petitioner at the track often (Tr. 78), and that throughout 1964 he cashed twin double tickets for him many times both at Yonkers and at Roosevelt (Tr. 85). Pipitone was able to recall several specific instances when he had cashed such tickets, the cash value of the tickets varying from $4,000 to $16,000 (Tr. 86, 107, 111, 122, 123).

Joseph Aquilato testified that on approximately ten or twelve occasions from April to November 1964, he cashed twin double tickets for petitioner at Yonkers and Roosevelt Raceways or observed one McDougall dividing money between petitioner and others (Tr. 536–537, 623–624).

Joseph Lynch, an employee of Roosevelt Raceway, testified that in January 1966 Roosevelt changed its policy so that all tickets worth more than $5000 would be paid for only by check (Tr. 780).

Michael Herbst testified that in January of 1966 he and a friend named Irwin Stein met with petitioner in a car in a parking lot outside Roosevelt Raceway and that petitioner asked him to cash a